IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-763

WALTER S. BRACKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF AUTHORITIES

CASES: Page

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Argument

In its brief opposing grant of the petition for certiorari in this case, the United States has painted with too broad a brush. It argues in effect that decisions articulating constitutional rights may be given retrospective effect *only* when those rights are designed to protect the factfinding processes on which the accuracy of determinations of factual guilt or innocence must depend. The Government also would dismiss the petitioner's retroactivity claims on the ground that they are "of diminishing importance."

The short answer to these contentions is that this Court has neither fashioned nor applied the overly simply retroactivity rule that the Government espouses. The Court

has not given retroactive effect only to those constitutional rules that are critical to assuring the accuracy of the finding that a defendant has or has not actually committed a charged offense. The Court has also made retroactive those rules that affect the extent, if any, to which the defendant may be punished as a criminal for such an offense. See *McConnell* v. *Rhay*, 393 U.S. 2 (1968); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

Furthermore, all retroactivity issues are "of diminishing importance" in that the number of cases presenting them dwindles as the decisions on which they rely recede in time. The amount of recent litigation surrounding the issues here raised demonstrates their still current impotance. The underlying constitutional rights are also of very real importance to this petitioner.

For a full treatment of these questions, we refer the Court to the petition.

Two assertions in the Government's brief, however, require response.

1. The United States' leading argument on the *Kent* [1] retroactivity question is that

> "by pleading guilty in the adult court, petitioner waived his claim that his juvenile waiver hearing did not meet statutory or constitutional standards." (Brief for the United States in Opposition ("Opp.") at 4.)

The cases on which the Government relies are simply inapposite.[2] All except *Wilhite*, where no *ratio decidendi* was set forth, depend upon the theory of *Tollett* and of

[1] *Kent* v. *United States*, 383 U.S. 541 (1966).

[2] *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brown* v. *Cox*, 481 F.2d 622 (4th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Smith* v. *Yeager*, 459 F.2d 124 (3d Cir. 1972); *Wilhite* v. *United States*, 281 F.2d 642 (D.C. Cir. 1960).

the *Brady* trilogy.[3] Those cases stand only for the proposition that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it . . . removes the issue of *factual guilt* from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (emphasis added). Thus, "a guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Id.*

This Court has held, however, that a guilty plea is no bar to a claim that a court is, *ab initio*, "precluded by the United States Constitution from haling a defendant into court on a charge . . . ." *Menna* v. *New York*, 423 U.S. at 62, citing *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974). Petitioner's *Kent* argument in this case is just such an assertion: that because the juvenile court's waiver of jurisdiction over petitioner was constitutionally defective, the trial court lacked jurisdiction over petitioner. The application of *Blackledge* and *Menna* to this case could not be more straightforward. Here, as there, "the claim is that the [trial court could] not convict petitioner no matter how validly his factual guilt is established." *Menna* v. *New York*, 423 U.S. at 62 n.2.[4]

2. The Government concedes that, if petitioner had presented with specificity his claim under *United States* v. *Tucker*, 404 U.S. 443 (1972), petitioner would have been entitled to a hearing on that portion of his § 2255 motion. The Government maintains, however, that the District Court "was correct in not holding a hearing," because petitioner's motion did not contain "sufficient fac-

[3] *Parker* v. *North Carolina*, 397 U.S. 790 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).

[4] See also *Journigan* v. *Duffy*, 552 F.2d 283 (9th Cir. 1977); *United States* v. *Sams*, 521 F.2d 421 (3d Cir. 1975).

tual allegations to support the claim for relief." (Opp. at 14.) In particular, citing *Sanders* v. *United States*[5] and lower court cases, the Government faults petitioner for failing "to allege specifically *what* prior convictions the court had relied on and *in what manner* the court had relied on them." (Opp. at 14; emphasis added.)

But *Sanders* does not govern the instant case. The petitioner in *Sanders* "alleged no facts but merely the conclusions that (1) the 'Indictment' was invalid, (2) 'Appellant was denied adequate assistance of Counsel as guaranteed by the Sixth Amendment,' and (3) the sentencing court had 'allowed the Appellant to be intimidated and coerced into intering [sic] a plea without Counsel, and any knowledge of the charges lodged against the Appellant.'" 373 U.S. at 5. This Court upheld dismissal of the motion because it "stated only bald legal conclusions with no supporting factual allegations." *Id.* at 19.

The § 2255 motion of petitioner in this case asserted markedly more than "only bald legal conclusions." Petitioner argued as follows in his *pro se* motion:

> "At the time of sentencing the trial judge took into consideration past convictions of plaintiff even though he was a juvenile and was not represented by counsel. This cannot be done under *United States* v. *Tucker*, 404 United States 443 (1972). By this ruling a trial judge during the sentencing process cannot take into consideration any prior convictions when the accused was not represented by counsel. *United States* v. *Tucker* was reinforced by *Argersinger* v. *Hamlin*, 407 United States 25 and Argersinger was made fully retroactive by the very recent case of *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1973. See also the recent case of *Brown* v. *United States of America*, CCA 4 decided August 1, 1973 (72-1312). See also the frequently cited case of *Lipscomb* v. *Clark*, 468 F (2) 1321 CCA 5 (1972). This principle of law is fully retroactive." (A. 52.)

[5] 373 U.S. 1 (1963).

Thus, petitioner alleged specific facts and contended that those facts entitled him to relief under applicable law.

Moreover, the transcript of the sentencing proceeding, which consisted of only five typewritten pages and was before the District Court that dismissed petitioner's motion, confirmed at least some of petitioner's factual assertions. The transcript contains the following statements by the trial court concerning the records of petitioner and one of his codefendants:

> "They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment." (A. 42.)[6]

The readily available sentencing transcript itself, therefore, in large part answers the objections of the Government here and below (A. 64) that petitioner's motion failed to specify *what* convictions the sentencing court considered and *in what manner* it relied on them. In these circumstances, it would be an absurd allocation of burdens to demand more specificity of petitioner's motion before he is even accorded a hearing. His motion alleged facts; the sentencing transcript alone substantiated some of those facts; this was enough to entitle him to a hearing. *Sanders* is not to the contrary.

[6] The court was here referring to petitioner's juvenile convictions for motor vehicle (one motor bike and two automobiles) thefts and juvenile home escape attempts. Court records of at least one of the convicting tribunals—the Family Court, Greenville County, South Carolina—reveal that no lawyer appeared for petitioner, who was then 12 years old. See Brief for Petitioner-Appellant, September 8, 1975, at 42 n.17.

We accordingly submit that the appropriate relief here is summary reversal with direction that a hearing be held. Petitioner should not again have to run the risk of denial of the hearing to which the Government concedes he is entitled.

CONCLUSION

For the reasons set forth above and in the Petition, the Court should grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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